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ALEXANDER L. STEVAS,
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No.

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1985

PAUL PETERS,
Appellant,
v.

STATE OF CALIFORNIA
Appellee.

Appeal from the Appellate Department of
the Superior Court
Los Angeles County, California

JURISDICTIONAL STATEMENT

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QUESTION PRESENTED

Can Appellant be convicted of two counts, when one count was barred by the Statute of Limitation, and the other is based on a Vague and Ambiguous Municipal Code Section of the City of Los Angeles ?*

* The parties to this action are the City of Los Angeles and the California Superior Court, who's Los Angeles County Appellate Department was the highest California Court passing on the merits of this case.

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JURISDICTIONAL STATEMENT

OPINION BELOW

The final Opinion and Judgement of the Appellate Department of the Superior Court Los Angeles County, California is unreported, but is reproduced in the Appendix at A1 to A . Further review was denied by postcards, by both the California Appel-

late (2nd. Dist.) and the Supreme Courts.

JURISDICTION

In affirming appellant's conviction, the Appellate Department of the Los Angeles Superior Court sustained the constitutionality of section 57.10.05B of the Los Angeles City Municipal Code(LAMC) regulating the passageway of fire-exits. In the same decision the Appellate Department refused to apply California Penal Code sec 801, limiting the filing of misdemeanor complaints to one year, violating Appellant's constitutional right to Equal Protection. The judgement of the Appellate Department was entered on Feb. 6, 1985

The Second Appellate District of the California Court of Appeal denied appellant's Petition for Writ of Mandate and/or Prohibition without opinion, by postcard, on March 15, 1985.

The California Supreme Court denied appellant's Appeal or in the alternative Petition for Hearing without opinion, on a postcard, on Apr. 24, 1985.

Notice of Appeal to the Supreme Court of the United States was filed on May 15, 1985 in the Appellate Department of the Superior Court, with copies served on the California Supreme, Appellate and Municipal Courts, and on the California Attorney General, LA District and City Attorneys.

The jurisdiction of this Court is conferred by Title 28, United States Code, Section 1257(2).

CONSTITUTIONAL PROVISION

United States Constitution, Amendment XIV. sec.1., Due Process and Equal Protection as set forth in Appendix B1.

STATUTORY PROVISIONS

California Penal Code, sec. 802 (for-

mer PC.801[a]) 1 year statute of limitation for misdemeanor complaints.

> "Sec. 802. Offenses not punishable by death or imprisonment
> Prosecution for an offense not punishable by death or imprisonment in the state prison shall be commenced within one year after commission of the offense."

LAMC 57.10.05B OBSTRUCTION OF AISLES AND PASSAGEWAYS as given in jury instruction:

> "Any person who fails to maintain a passageway with a width equal to or greater than the width of the required exit, from the required exit to a public way, or to any area designated by the fire chief or his authorized representative is guilty of a misdemeanor.
>
> Lines shall be painted or other means, approved by the Chief or his authorized representative, used delineating the passageway and no person shall park any vehicle or place any power truck, hand dolly, delivery rack, refuse or waste container or any other material object in, or in any manner obstruct the areas so delineated."

LAMC 57.01.35A3 REQUIREMENT OF A BUILDING PERMIT as given in jury instruction:

"Any person who installs, alters or conducts a major repair on any latches, locks, panic bars and similar devices for exit doors and gates without a permit of the Department of Building and Safety when a permit is required by that Department is guilty of a misdemeanor."

STATEMENT OF THE CASE

I. The Factual Background

Appellant, Paul Peters, purchased an apartment building at 3471 W. 5th St., Los Angeles, in early 1978. Because of previous rape, burglaries, and loitering in the building, appellant retained a licensed contractor to install security metal doors at the front gate and fire escape windows on 4/8/78. In 1979 at the fire inspectors demand, the metal doors over the fire escapes were modified. Subsequent visits in 1980, 1981, and 1982 by different fire inspectors resulted in no objection about the "metal doors".

During the 1983 fire inspection, a new

fire inspector warned appellant on several items: item 3, install signs over fire hoses, item 6, remove stored items obstructing hallway, and item 7, remove fire escape metal doors. All items were corrected, except the removal of the metal doors, which appellant refused to do, relying on the fact that the doors had been modified according to the fire inspector`s request and satisfaction in 1979

On 11/22/83, the City of Los Angeles filed a misdemeanor complaint charging the three violations cited as items 3,6 and 7, in the fire inspector's notice, even though two were already corrected, in an obvious retaliation for appellant's refusal to remove the metal doors.

On the day of the trial, Count I, charging the lack of signs over some fire hoses was dropped and a new count charging that the metal doors were installed

without a building permit was added, over defendant's objection.

II. The Proceedings in this Case.

The trial court ruled that lack of building permit is a strict liability offense and prevented the introduction of evidence showing that defendant's contract provided for the contractor to obtain all necessary licenses, that the contractor regularly obtained permits, and that when the existence of the permit was first mentioned, defendant tried to secure a variance which was recommended by the building department but was vetoed by the fire department.

The jury after being instructed on all three counts, acquitted on Count I (installing a door which could not be opened in 30 seconds without special knowledge, this was the fire inspector's objection to said doors) and convicted on Counts II and

III (failure to provide a passageway of required width from exit to public way and installing without a building permit, issues never raised or objected to by any fire or building inspector.)

Appellant appealed from the verdict, contending that: 1) the filing of charges on issues never objected to by any inspector, nor even mentioned prior to the trial, clearly shows prosecutorial vindictiveness; 2) the building permit issue more than five (5) years after the fact was barred by the one (1) year Statute of Limitation; and 3) the code section talking about not parking any vehicles in the Passageway can not apply to Appellant's seventh floor fire escape, and if it does, it is unconstitutional for ambiguity. The Appellate Department of the Los Angeles Superior Court affirmed, side-stepping the issues.

Consistent with California procedure, Appellant petitioned for a Writ of Mandate and/or Prohibition to the Court of Appeal, and subsequently filed an Appeal with the California Supreme court, raising constitutional issues. Both courts denied review

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

I.

Can a state and its Courts vigorously enforce laws to protect felons and other serious criminals, but deny the protection of the same laws to the rest of the population, without violating the later group's constitutional right to Due Process and Equal Protection?

A. Statute of Limitation

On the first day of trial, the prosecution amended its complaint by charging Appellant with building without a building permit, a misdemeanor. The trial Court

ruled this to be a strict liability offense, and prohibited any mitigation. On appeal, Appellant raised the issue of Statute of Limitation. The Appellate Dept. held this argument meritless because it was not Raised in the trial court. This holding flies in the face of California case law and the facts.

1. Appellant was surprised by the last minute addition of this charge, objected to it and was overruled by the trial judge.

2. The statute of limitation in criminal prosecutions is jurisdictional. People v. McGee, 1 C.2d 611; 36 P.2d 378. People v. Rehmman, 62 C.2d 135; 41 Cal. Rptr. 457; 396 P.2d 913. Prosecution within the period specified is an essential element of the offense. People v. Allen, 47 C.A.2d 735; 118 P.2d 927.

3. The California Courts held that a

law established for a public reason can not be contravened by a private agreement, nor can rights be waived by a defendant, which belong to the public generally. People v. Dominguez, 256 C.A.2d 623; 54 Cal. Rptr. 290. People v. Werwee, 112 C.A.2d 494; 246 P.2d 704. People v. Blakeman, 170 C.A.2d 596; 339 P.2d 202. The above principle should apply in case of the statute of limitation, enacted as a fundamental public policy, protecting the reliability of evidence.

4. It is specifically provided that an objection is not required in order to preserve instruction issues. Cal.P.C. 1259 People v. Hannon, 19 C.3d 588.

5. Error in the jury instruction in a criminal prosecution may justify reversal of the judgement when the jury is misdirected or mislead on an issue vital to the defense, and the evidence does not point

unerringly to the guilt of the person accused. People v. Colver, 107 C.A.3d 277.

The evidence did not point at all to Appellant's guilt, when his contract charged the contractor with obtaining the necessary permits; when the contractor as normal business practice regularly obtained permits, but the records were no longer available, because the contractor went bankrupt; and when the prosecution witness stating that he found no permit, admitted that it might be misfiled.

Under the cases cited in I.A.2, the Statute of Limitation is jurisdictional and an element of the offense; according to cases in I.A.3, provisions established for public reason can not be waived by a defendant; and cases cited in I.A.4 & 5, held that jury instruction issues are preserved without objection and may justify reversal.

Appellant's conviction for allegedly building without a building permit should have been stricken under all of the above rationale.

B. Unconstitutionally Vague and Ambiguous Law

In the original dispute, the fire-inspector accused appellant with obstructing the 6th floor fire exit with the installation of metal security doors, locked from the inside, because in the fireman's opinion to open the doors took special knowledge. (This contention was refuted by all tenants opening said doors without any prior instruction and was rejected by the Jury.)

Based on above dispute, the prosecution charged appellant with the violation of LAMC Sec.57.10.05B Obstruction of Aisles and Passageways. (Reprinted on p.4)

The law allegedly violated requires the maintenance of a passageway equal or greater in width than the required exit. Both the fire and the building inspector testifying for the prosecution agreed that there is no standard for the width of old fire escapes, they use judgement. Several other fire-inspectors inspected the building in previous years, without objecting to the same condition, obviously they judged it to be adequate. The fire ladder is narrower than the fire escape window, which is the subject of this controversy, but that remains to be judged wrong by an other inspector.

The subject code section also prohibits parking in the passageway, a surprising condition to apply to a 6th floor fire escape landing.

A statute that either forbids or requires the doing of an act in terms so

vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law. Bowland v. Municipal Court, 18 C.3d 479; 134 Cal.Rptr. 630; 556 P.2d 1081.

Any legal proceeding enforced by public authority, must be held to the due process of law. Hurtado v. California, 110 U.S. 516; 28 L.Ed. 232; 4 S.Ct.111.

The first essential of due process in criminal law is fair warning of the act which is made punishable as a crime, and the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties. Keeler v. Superior Court of Amador County, 2 C.3d 619; 87 Cal.Rptr. 481; 470 P.2d 617. (superseded by statute as stated in People v. Carl-

son, 37 C.A.3d 342; 112 Cal.Rptr. 321)

The Appellate Department obviously impressed by the fact, that this section is under the general heading of "Safety of Life from Fire," strained to uphold it, by declaring, that: "a violation occurs if the passageway is not at least as wide as the exit." (Opinion p6. lns 1-2)

The Appellate Department's attempt to construe the code section, still leaves one at a loss as to what is the passage-way or the exit on the 6th floor of a building, and how can the fire-escape window be in violation under said section, if the narrower fire-escape ladder is O.K.

While fire safety is most important, it should not be used to excuse a poorly written, unintelligible, useless statute, allowing every bureaucrat to harass the public, based on his JUDGEMENT.

(The building in question is classed

by the city Building Dept. noncombustible, all tenants [one over 350 lbs] passed trough the allegedly unsafely narrowed fire-exit window, to the narrower fire-exit ladder, and all tenants petitioned to leave the metal doors over the fire-escape window in place, to protect them from criminal intrusion into the building.)

C.Vindictive Retaliatory Prosecution

The only dispute between Appellant and the Fire-inspector was whether the metal doors over the fire-escape windows, (protecting the tenants from criminals) canbe opened in 30 seconds, without special knowledge. (LAMC Sec.57.10.03) Correcting all other conditions objected to by the inspector, appellant elected to test this issue in Court. (The Jury acquitted him on this charge.)

For electing to utilize every citizen's lawful right, to have a dispute ajudicated, Appellant was subjected to accusations on additional trumped up charges, which confused the jury, resulting in the convictions appealed of.

While appellant found no law on point, it is still respectfully submitted, that such unconscionable practices, attempting to miscarry justice should be prohibited.

CONCLUSION

For the foregoing reasons the Opinion and Judgement of the Appellate Department of the California Superior Court should be summarily reversed, and Appellant's conviction should be stricken.

Respectfully submitted,

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APPENDIX A

APPELLATE DEPARTMENT
OF THE SUPERIOR COURT STATE
OF CALIFORNIA,
COUNTY OF LOS ANGELES

FILED FEB 06, 1985
Frank S. Zolin,
County Clerk

PEOPLE OF THE STATE
OF CALIFORNIA,

Plaintiff and Respondent,

Superior Ct. CR A21548

vs

PAUL PETERS,

Municipal Court of the L.A. Judicial Dist. No. 31274748

Defendant and Appellant.

OPINION AND JUDGMENT

Appeal by defendant from JUDGMENT of the Municipal Court, Rand Schrader, Judge.

JUDGMENT AFFIRMED.

For Appellant -- Tibor I. Toczauer

For Respondent -- Gary R. Netzer, City Attorney
Jack L. Brown, Deputy City Attorney
Janet E. Bogigian, Deputy City Attorney

Appellant Paul Peters was charged on November 22, 1983, with violating various provisions of the Los Angeles Municipal Code.[1] The complaint, in three counts, alleged violation of section 57.01.35(D) (failure to install fire hose signs); section 57.01.03 (installation of gates which could not be opened in 30 seconds) and section 57.01.05(B) (failure to maintain a passageway at least as wide as required exits), respectively. On January 18, 1984, the trial court granted the People's motion to dismiss the count for violation of section 57.01.35(D) and amend the complaint to add a new count for violation of section 57.0135(A)(3)

1/ Unless otherwise noted, all section references are to the Los Angeles Municipal Court.

(installation of gates on exit doors without a building permit). On January 24, 1984, the jury found appellant guilty of violating sections 57.01.05(B) and 57.01.35(A)(3). After denial of his motion, for "modification of the verdict" and new trial, Peters was placed on summary probation for 24 months on the condition, inter alia, that he pay a fine of $300 for violation of section 57.01.35(A)(3). The court further decreed that the stay would become permanent if Peters successfully completed the sentence imposed for violation of sections 57.01.35(A)(3).

Issues on Appeal

Appellant argues that he was a victim of prosecutorial vindictiveness, the charge for violation of section 57.01.35 (A)(3) is barred by the statute of limitations and section 57.10.05(B) is

constitutionally vague and ambiguous. We conclude that each argument lacks merit.

Discussion

Peters contends that the prosecutor had vindictive and retaliatory motives when he amended the complaint to add the count for violation of section 57.10.35(A)(3) and refused to dismiss the count for violation of section 57.10.05(B). The prosecutor was motivated, Peters suggests, by the desire to intimidate him into sacrificing his rights and to establish a presumption of guilt by alleging numerous counts in the complaint.

Prior to the decision of the California Supreme Court in Twiggs v. Superior Court (1983) 34 Cal.3d 360, prosecutorial vindictiveness could only have been raised at the postconviction stage of the proceedings. In Twiggs, the

court determined that the decision of the prosecutor to allege certain prior convictions for the first time upon remand and after defendant's refusal to accept a plea proposal "strongly suggest[ted] that the prosecutor unilaterally imposed a penalty in response to the defendant's insistence on facing jury trial . . . . [A] presumption of vindictiveness, [therefore], arose . . . ." (Id., at 371.) Subsequent lower court decisions have applied Twiggs narrowly and limited it to situations where the prosecutor "raised the ante" after a conviction, accelerated the penalties upon the same set of facts, added charges arising out of the same transaction or "spree" or acted in response to a refused plea offer. (See People v. Lucious (1984) 153 Cal.App.3d

416; People v. Tirado (1984) 151 Cal.App.3d 341.)

The case at bench does not involve postconviction charges, accelerated penalties or plea negotiations. Appellant does, however, seem to suggest that the additional charge arose from the same factual transaction and could, therefore, have been filed as part of the original complaint. Assuming this to be true, appellant still cannot prevail because he has not alleged that the prosecutor's decision to amend the original complaint was in response to his exercise of any procedural right.

The Twiggs court, in establishing a framework in which to examine the motivations of a prosecutor, stated:

> Where the defendant shows that the prosecution has increased the charges in

apparent response to the defendant's exercise of a procedural right, the defendant has made an initial showing of an appearance of vindictiveness. (U.S. v Burt (9th Cir. 1980) 619 F.2d 831, 836.) The defendant need not demonstrate that the prosecution in fact acted with a retaliatory motive (id. at p. 836.) Once this prima facie case is made, the prosecution bears a "heavy burden" of dispelling the appearance of vindictiveness as well as actual vindictiveness. (United States v. Ruesga-Martinez, supra, 534 F.2d at p. 1369; see also United States v. Groves (9th Cir. 1978) 571

F.2d 450, 453, and cases cited therein.)

(34 Cal.3d at 371.) Because the appellant does not allege that the prosecutor's decision was in response to an exercise of some procedural right, we hold that he has failed to establish prosecutorial vindictiveness.

Appellant also argues that the count based on violation of section 57.01.35(A)(3) is barred by section 801(a) of the Penal Code. Section 801(a), in pertinent part provides that "an indictment for any misdemeanor shall be found or an information or complaint shall be filed within one year after its commission." Appellant states that the violation in question occurred sometime in 1978 when he failed to obtain a permit to install gates on exit doors. Because the charges were not filed until

January 18, 1984, he argues further, they are barred by operation of section 801(a).

We do not reach this issue because there is nothing in the record to suggest that it was properly asserted in the trial court. We cannot consider facts raised in a brief because they are not part of the record on appeal. (People v. Merriam (1967) 66 Cal.2d 390, 397; People v. Jablon (1958) 165 Cal.App.2d 348, 350.)

Finally, appellant argues that section 57.10.05(B) is unconstitutionally vague. Section 57.10.05(B) provides:

> A passageway with a width equal to or greater than the width of the required exit shall be maintained from the required exit to a public way or to any area designated by

> the Chief or his authorized representative. Lines shall be painted or other means, approved by the Chief or his authorized representative, used delineating the passageway and no person shall park any vehicle or place any power truck, hand dolly, delivery rack, refuse or waste container or any other material object in, or in any manner obstruct the area so delineated.

Specifically, appellant argues, the use of the term "passageway" and the requirement that the passageway be "equal to or greater than the width of the required exit" renders section 57.10.05(B) void for vagueness.

In construing any statutory provision, we must consider the overall statutory scheme as manifested in the deliberate use of titles, headnotes and section headings. (Bowland v. Municipal Court (1976) 18 Cal.3d 479.) When examined in this context, it is apparent that appellant's arguments are without support.

Because section 57.10.05(B) is contained in division 10 of article 7, chapter 5, which is titled "Safety of Life from Fire," and subdivision (A) of section 57.10.05 specifically exempts single family dwellings from its provisions, it is clear that the term refers to fire escapes in a multi-unit dwelling. Similarly, the requirement that the passageway be equal to or greater than the width of an exit clearly means that a violation occurs if

the passageway is not at least as wide as the exit. Accordingly, we conclude that section 57.10.05(B) is drafted in a manner which can be easily understood by a person of common understanding and applied by city officials. (Connolly v. General Constr. Co. (1926) 269 U.S. 385, 396.) We further conclude that appellant's conduct fails within the bounds of section 57.10.05(B) (Bowland, supra, 18 Cal.3d at 492.) It is apparent, therefore, that appellant's arguments lack merit.

The judgment of the trial court is affirmed.

BERNSTEIN
Judge

I concur.

REESE
Presiding Judge

APPENDIX B

AMENDMENT XIV

Citizenship, Representation and Payment of Public Debt

Section 1

CITIZENSHIP

All persons born or naturalized in the United States are subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws. (Emphasis added)

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 3550 Wilshire Boulevard, Suite 916, Los Angeles, California. On this date, July 19, 1985, I served the within JURISDICTIONAL STATEMENT in re: "Paul Peters -vs- State of California", In the Supreme Court of the United States, October Term 1985. No. _____.

on the persons interested in said action by placing 3 true copies thereof enclosed in sealed envelopes with first class postage prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

GARY R. NETZER, CITY ATTORNEY
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I certify (or declare) under penalty of perjury that the foregoing is true and correct.
Executed on July 19, 1985
at Los Angeles, California.

Kathleen Kaltenbach